

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Wireless Telecommunications Bureau Seeks	)	WT Docket No. 05-194
Comment on Petition for Declaratory Ruling Filed	)	
by CTIA Regarding Whether Early Termination	)	
Fees are "Rates Charged" within 47 U.S.C. Section	)	
332(c)(3)(A)	)	

To: The Wireless Telecommunications Bureau

**COMMENTS OF  
DOBSON COMMUNICATIONS CORPORATION**

Dobson Communications Corporation ("Dobson") hereby submits its comments in support of the above-referenced petition for declaratory ruling filed by the Cellular Telecommunications & Internet Association ("CTIA").<sup>1</sup> Dobson agrees with CTIA that fees assessed by commercial mobile radio service ("CMRS") providers for the early termination of fixed, long-term service agreements, *i.e.*, early termination fees ("ETFs"), are directly related to a CMRS carrier's rate structure. Dobson also agrees that ETFs benefit the public, especially those individuals in rural areas, by allowing CMRS carriers to offer a wide variety of competitive rate plans with low monthly rates and subsidized handsets.<sup>2</sup> State laws and lawsuits that seek to prohibit, restrict or nullify ETFs directly affect the carrier's rate structure, and are therefore preempted by the statutory proscription against the regulation of rates by states as set forth in

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<sup>1</sup> See *Public Notice*, "Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling Filed by CTIA Regarding Whether Early Termination Fees are 'Rates Charged' within 47 U.S.C. Section 332(c)(3)(A)," WT Docket No. 05-194, DA 05-1389 (rel. May 18, 2005).

<sup>2</sup> Dobson is one of the largest providers of rural and suburban wireless communications services in the United States, offering services to a population base of 11.8 million people in sixteen states stretching from Alaska to New York. Dobson operates through two primary subsidiaries, Dobson Cellular Systems, Inc. and American Cellular Corporation.

Section 332(c)(3)(A) of the Communications Act of 1934, as amended.<sup>3</sup> Commission grant of CTIA's petition and the resulting preemption of state action against the imposition of ETFs is now required to stem the rising tide of costly and unlawful state litigation over ETFs and to ensure the further development of the competitive and national deregulatory framework envisioned by Congress.

## DISCUSSION

The Commission has consistently interpreted Section 332(c)(3)(A) broadly to prohibit the state regulation not only of specific CMRS rates but also of CMRS "rate levels" and "rate structures."<sup>4</sup> Any application of state law that would prohibit, invalidate, modify, or condition the use or enforcement of ETFs by CMRS carriers squarely falls "within the statute's zone of proscribed state regulatory activity" because the imposition of an ETF directly relates to the rates charged for mobile service.<sup>5</sup>

Dobson, a carrier that serves predominantly rural areas, offers rate plans that vary depending on whether an ETF is charged. Under fixed, long-term arrangements of one to two years with an ETF component, a Dobson subscriber can take advantage of discounted per-minute rates, a larger bucket of minutes resulting in a lower per-minute cost, and/or very low, below cost handset charges. Dobson is able to offer such popular plans only because the consumer has committed to the long-term arrangement (*i.e.*, allowing for the handset subsidy to be amortized over a long term), and because the ETF provides a financial hedge in the event that the

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<sup>3</sup> See 47 U.S.C. § 332(c)(3)(A).

<sup>4</sup> See *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, *Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking*, FCC 05-55 at ¶ 30 (rel. Mar. 18, 2005) ("2<sup>nd</sup> TIB Order").

<sup>5</sup> *Id.* The Commission has previously found that "state court actions are regulatory actions subject to Section 332." *Wireless Consumers Alliance, Inc.*, 15 FCC Rcd 17021, 17027 (2000).

subscriber chooses to break its contract and terminate service prematurely.<sup>6</sup> For subscribers that want the flexibility to terminate their use of the service at any time, Dobson, like other carriers, offers “pay-as-you-go” calling plans without any ETF. However, such plans require the subscriber to pay a higher usage rate and handset cost, illustrating that the ETF is a direct element of a carrier’s rate structure. ETFs have benefited consumers in rural areas by allowing carriers like Dobson to appropriately allocate risk and provide rate plans that are competitive with the offerings of national carriers and are commensurate with the rate plans available in urban areas.

As Dobson commented in the Commission’s proceeding on the federal/state jurisdictional boundary with respect to billing practices, Section 332(c)(3)(A) must be broadly construed to ensure the national regulatory framework envisioned by Congress for CMRS.<sup>7</sup> Dobson, like CTIA, has become increasingly alarmed by state efforts to restrict or prohibit the use of ETFs in long-term service arrangements. For example, the Attorney General in West Virginia recently informed Dobson that it believes ETFs violate state laws that were adopted to regulate fees charged in connection with consumer credit sales.<sup>8</sup> Such creative interpretations of state law threaten the continued availability of long-term service plans currently enjoyed by consumers nationwide. Without the security against risk that an ETF provides, carriers will be disinclined

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<sup>6</sup> As the Commission has acknowledged in the wireline arena, ETFs are “a valid *quid pro quo* for the rate reductions included in long-term plans” and allow carriers “to allocate the risk of investments associated with long term service arrangements with their customers.” *Ryder v. AT&T Corp.*, 18 FCC Rcd 13603 at ¶ 33 (2003). Dobson’s ETF is tailored so that the amount of the ETF decreases during the term of contract, reflecting the return on the handset investment that the EFT is designed to hedge against. Moreover, pursuant to the CTIA Consumer Code of Conduct, Dobson, like most carriers offers subscribers a 14-day trial period when the customer can cancel a long-term agreement without incurring an ETF.

<sup>7</sup> See Dobson Comments, CC Docket No. 98-170 (filed June 24, 2005).

<sup>8</sup> In support, the attorney general cited the West Virginia Consumer Credit Act, W. VA. Code § 46A-1-101 *et seq.*

to offer such plans.<sup>9</sup> Consumers who are willing to trade an ETF for reduced rates and/or a subsidized handset would effectively lose the ability to choose this option.

In addition to eliminating meaningful long-term rate plans, state regulation will have additional unintended consequences to all consumers, not just those consumers located in states that prohibit or restrict ETFs. For example, investors consider the existence and enforceability of long-term contracts, and thus the relative certainty of subscriber revenue, when evaluating a company for investment. A carrier's inability to offer meaningful long-term agreements in certain states that prohibit or heavily scrutinize ETFs could decrease the attractiveness of wireless carriers to the investment community, thus adversely affecting some carriers' ability to obtain investment for on-going and future network improvements. Access to capital is particularly important for regional and smaller carriers to serve rural areas that have a higher marginal cost due to the smaller consumer base for cost allocation.<sup>10</sup> State regulation of ETFs could therefore impact a carrier's ability to provide consumers in all states, especially in rural areas, with expanded and advanced service offerings.

No less significantly, if states are allowed to regulate ETFs, a patchwork quilt of regulation will result in which carriers will need to offer service plans that differ by state of operation, denying carriers the efficiencies of regional and national operations.<sup>11</sup> Today, carriers can offer the same plans to consumers and rely on the same standard billing format, promotional

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<sup>9</sup> Without ETFs, there would be no meaningful consequences for subscribers that terminate their agreement before the term ends because carriers are unlikely to litigate every customer breach for early termination given that the cost of litigation will often exceed the loss caused by the breach. See Calamari, Joseph P. & Perillo, Joseph M., *Contracts*, 3<sup>rd</sup> Edition (1987) ("In the United States an award for damages does not ordinarily include reimbursement of the successful party's attorney's fees.").

<sup>10</sup> See *Facilitating the Provision of Spectrum Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, *Report and Order*, 19 FCC Rcd 19078, 19101-02 (2004).

<sup>11</sup> In the truth-in-billing proceeding, the Commission noted that regulations of line-item surcharges that varied by jurisdiction would impede regional and national pricing plans, thus underscoring the need for federal preemption. See 2<sup>nd</sup> TIB Order at 35.

material, and advertising on a regional and even national basis. If states are allowed to regulate ETFs, carriers will be required to modify their service offerings, marketing and billing on a state-by-state basis, which significantly increases the costs of doing business, costs that are ultimately passed on to the consumers.

### **CONCLUSION**

To ensure that state actions do not thwart the pro-competitive deregulatory framework envisioned by Congress for CMRS, Dobson supports CTIA's petition and urges the Commission to declare that the state regulation of ETFs in wireless service contracts directly affects CMRS rates and is therefore preempted by Section 332(c)(3)(A).

Respectfully submitted,

**DOBSON COMMUNICATIONS CORPORATION**

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